



**ADVOCATES**  
FOR HIGHWAY  
AND AUTO SAFETY

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January 12, 2003

Docket No. FMCSA-2003-15818  
U.S. DOT Dockets, Room PL-401  
U.S. Department of Transportation  
400 Seventh Street, S.W.  
Washington, D.C. 20590

**Exemption to Allow Werner Enterprises, Inc., to Use Global Positioning  
System (GPS) Technology to Monitor and Record Drivers'  
Hours of Service, 68 FR 69117 *et seq.*, December 11, 2003**

Advocates for Highway and Auto Safety (Advocates) submits these comments in response to the Federal Motor Carrier Safety Administration (FMCSA) proposal to grant a regulatory exemption to Werner Enterprises, Inc. (Werner), from the requirements that drivers of commercial motor vehicles operating in interstate commerce prepare handwritten records of duty status, commonly referred to as "logbooks." This action follows a pilot program in which Werner was the sole applicant approved for participation since the inception of the pilot program on April 6, 1998. The pilot program approved Werner's use of Global Positioning Systems (GPS) to record commercial driver hours of service (HOS) following a Memorandum of Understanding (MOU) signed on June 10, 1998, concerning the procedures and protocol that Werner would follow in substituting GPS tracking and recordation of HOS compliance in lieu of paper logbooks.

In the instant notice with a request for comments, the FMCSA asserts that "[a] copy of the revised MOU [of March 2002] is in the docket referenced at the beginning of this notice." 68 FR 69117. However, the MOU is not in the public docket available on-line at the U.S. Department of Transportation's docket web site, contrary to this assurance. The original MOU was also not made publicly available, along with other relevant documents (including a California Highway Patrol Information Bulletin No. 98-98, n.d.) that reviewed the paperless system used by Werner for demonstrating HOS compliance.

Advocates strongly objected to the original GPS protocol approved by the predecessor agency having jurisdiction in this matter by letter of February 3, 1999, sent from Judith Lee Stone, President of Advocates, to then-Administrator of the FHWA,

Kenneth Wykle.<sup>1</sup> Among other issues addressed in Ms. Stone's letter, she requested a public proceeding to ventilate the merits of Werner application to use GPS. Ms. Stone also asked the FHWA to provide public availability of the 1998 MOU and other relevant documents.

As of the date of submission of these comments by Advocates, the requested documents have not been made available to the general public by notice in the Federal Register. Moreover, no public involvement in this topic was requested by the agency in the intervening years from the date of Werner's approval to use GPS until the instant notice was published in the Federal Register on December 11, 2003. In addition, although the MOU was purportedly modified in March 2002, to change the terms of the pilot program, this action also was not provided for public notice and comment despite the requirements of 49 U.S.C. § 31315.<sup>2</sup> 68 FR 69117.

Advocates believes that the agency in 1998 allowed a protocol and other procedures for verifying commercial driver HOS compliance to be used by Werner that are manifestly illegal. We recorded our strong objections to the approach the FHWA was willing to accept in Ms. Stone's letter to former FHWA Administrator Wykle. Apparently, the FMCSA has allowed this illegal approach to HOS compliance to operate for at least four consecutive years. Furthermore, since the FMCSA did not seek public comments prior to amending the MOU and has not placed the March 2002 revised MOU in the docket for public evaluation, Advocates does not know to what extent the later MOU incorporated any changes that accommodated Advocates' objections to the original pilot program protocol agreed on by Werner and the agency.

Advocates continues to object to the terms of the proposed exemption contained in the instant notice. The proposed regulatory exemption states the multiple requirements of Werner's GPS system operation, of which section (c) sets forth the following protocol:

Speed (which is determined by time and distance between truck location updates) that is calculated to be below 10 miles per hour (mph) may be considered invalid. In these instances, distanced traveled may be divided by average driver mph [miles per hour] or average State-to-State mph to derive a rough estimate of the driving time. Werner must discontinue the use of driving time modeling entirely if Qualcomm improved the satellite positioning frequency or incorporates other technology that makes the modeling unnecessary.<sup>3</sup>

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<sup>1</sup> Incorporated in its entirety by reference and supplied as an attachment to this docket submission.

<sup>2</sup> Section 31315(c) provides that pilot programs are to be published in the Federal Register with opportunity for public comment. The MOU triggering operation of the pilot program occurred on June 10, 1998, but the agency to date has failed to observe the requirement for public notice and comments on the merits.

<sup>3</sup> This is particularly ironic in light of the later proviso proposed by the FMCSA for the regulatory exemption governing Werner's use of GPS for HOS compliance, viz., "(e) The System must not allow drivers to manipulate the system to conceal driving hours." 68 FR 69118. The FMCSA, however, is proposing an exemption protocol that inherently allows drivers to extend their consecutive and total weekly driving hours beyond the regulatory minimums.

68 FR 69118.

The agency is already in receipt of anecdotal information from submissions to this docket that the Werner paperless log system using GPS allows drivers operating at very low speeds in congested traffic conditions for several hours nevertheless to regard this driving time in their trucks as “off the clock.” Even if these reports are not accurate, the provision quoted in the foregoing paragraph permitting such averaged, low operating speeds to be irrelevant for calculating HOS compliance not only can promote sleep-deprived, fatigued drivers who are a risk to themselves and other vehicle occupants who share the roads with their trucks, but it permits productivity advantages to Werner that are not similarly available to motor carriers continuing to rely solely on written logbooks. These carriers are required under current and pending HOS regulations to record these low-speed operations as driving time. Advocates believes that the purpose of GPS HOS compliance oversight is increased accuracy in logging driving time in order to curtail excessive driving hours leading to driver fatigue and inattention, not a spoils system for certain motor carriers to gain inequitable productivity advantages over other carriers continuing to use paper record of duty status logbooks.

Advocates strongly opposes this feature of the instant proposal permitting Werner to disregard long driving times accrued under low speed operating circumstances. No rationale is provided by the FMCSA for awarding such largesse to Werner’s commercial operations, including any safety reason for permitting such a practice. The agency in this notice invokes reliance upon 49 U.S.C. §§ 31315 and 31136(c) for its authority to consider an award of a regulatory exemption. However, the agency fails to conform to the dictates of § 31315 at the threshold because it has not specifically demonstrated that the revised protocol for governing Werner’s substitute use of GPS tracking and recordation for paper logbooks “achieve[s] a level of safety that is equivalent to, or greater than, the level of safety that would otherwise be achieved through compliance with the regulations prescribed under this chapter or section 31136.” Title 49 U.S.C. § 31315(c)(2). In fact, the FMCSA does not even state a conclusory opinion in this notice that substituting GPS HOS monitoring for regulatory compliance is equivalent to, or better than, adherence to the current or prospectively implemented regulation. Indeed, such an assertion would be difficult to sustain because, as pointed out above, the agency has tendered an HOS compliance protocol through GPS use that would permit drivers to exceed maximum driving hours, an indulgence not available to motor carriers continuing to use paper record of duty status logbooks. As a result, agency adoption of this aspect of the proposed exemption has no safety basis in the administrative record fulfilling the legislative mandate of § 31315 and, accordingly, would be an arbitrary use of agency authority and discretion.

This failure to demonstrate the safety equivalence or superiority of the proposed GPS HOS compliance protocol by Werner, which paradoxically would permit drivers to exceed maximum permitted driving hours and, under the new regulation, maximum consecutive on-duty hours, compounds the existing violation of federal law by the agency. This notice asks for public comment on a pilot program that is now five and one-half years old despite the prohibition in 49 U.S.C. § 31315(c)(2)(A) that no pilot program shall be permitted to operate longer than three years.

Advocates would like to stress one additional issue in these comments. The FMCSA is proposing a regulatory exemption on demonstrating HOS compliance by a single motor carrier at a crucial juncture in the history of HOS regulation. The agency has earlier proposed implementing a final rule that substantially revises the requirements for HOS, on January 4, 2004. 68 FR 22456, 22514 (April 28, 2003). Adoption of the proposed exemption for Werner presumably would occur in the next several weeks and therefore would trigger GPS-monitored compliance with the features of the new regulation. However, that final rule of April 28, 2003, has been challenged in federal court by multiple plaintiffs, and oral argument on the merits has been scheduled for April 15, 2004. Advocates regards the issuance of a regulatory exemption in the current timeframe and legal environment to be especially improper given the indeterminate nature of the final rule as it proceeds under court scrutiny. Advocates believes that the merits of the Werner regulatory exemption should be evaluated only after court action and any ensuing agency accommodation of a ruling has occurred. Given the fact that the FMCSA as yet has no field experience with the oversight and enforcement of the terms of the April 28, 2003, final rule, it would be unwise to compound the complexity and confusion concerning the administration of the new rule with precipitous grants of exemptions for demonstrating HOS compliance.

Finally, Advocates is deeply concerned about allegations that the raw data of HOS compliance through GPS operation under the Werner waiver is not necessarily equivalent to the redacted versions of HOS compliance *via* GPS submitted by Werner to the FMCSA. There is no discussion in the instant notice of precisely how GPS data is converted into HOS compliance records for the FMCSA, or whether the agency seeks and evaluates the actual, raw GPS data transcriptions to match against HOS compliance claims made by Werner. This includes the extent to which the FMCSA independently vets the actual driving times of Werner's commercial drivers against the compliance times filtered through the GPS recordation protocol that allows very low, average operating speeds to be "off the clock." Accordingly, Advocates asks the FMCSA to make an independent assessment of the accuracy of the raw GPS data and the extent to which it undergoes various forms of redaction by Werner management to produce HOS compliance records for the agency's use. This assessment should be made promptly and its results should be provided for public evaluation and comment in the Federal Register.

Respectfully submitted,  
ORIGINAL SIGNED  
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Senior Research Director